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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY -2 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KATRINA G.,)	2 CA-JV 2012-0002
)	DEPARTMENT A
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY and HAILEE K.,)	
)	
Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100JD200900080

Honorable Joseph R. Georgini, Judge

AFFIRMED

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ECKERSTROM, Presiding Judge.

¶1 Appellant Katrina G. appeals from the juvenile court’s December 2011 order terminating her parental rights to her daughter Hailee on the ground that she had failed to remedy the circumstances that caused Hailee to remain in court-ordered, out-of-home care for fifteen months or longer. *See* A.R.S. § 8-533(B)(8)(c). Katrina argues the evidence was insufficient to sustain this statutory ground for severance or to establish that terminating her parental rights was in Hailee’s best interests. For the following reasons, we affirm.

Background

¶2 Shortly after Hailee was born in July 2008, the Child Protective Services (CPS) division of the Arizona Department of Economic Security (ADES) received a report alleging Hailee and Katrina’s other three daughters were being neglected, based on the “poor living conditions” Katrina and Hailee’s father, Bryan K., were providing.¹ CPS directed Katrina and Bryan to make necessary repairs and to “clean up” the home. After CPS received another report that October alleging that the poor living conditions had continued, it provided the family with in-home services.

¶3 In February 2009, Bryan was accused of sexually abusing one or more of Katrina’s other daughters, and Katrina agreed to prevent Bryan from having unsupervised contact with Hailee until the criminal investigation had been completed. But Katrina did

¹The three older girls were found to have developed ringworm, and the mobile home where the family had been living was in need of structural repairs that had been neglected. Bryan’s parental rights to Hailee were terminated on the ground of consent to adoption, *see* § 8-533(B)(7); he is not a party to this appeal.

not believe her daughter's allegations against Bryan, and CPS reported Katrina had misrepresented the status of the criminal investigation to a CPS worker and a juvenile court in an effort to have visitation restrictions removed.

¶4 An Apache Junction police detective later informed CPS that, although the Pinal County Attorney had declined to prosecute Bryan, the children had “appear[ed] credible” during their forensic interviews. Concerned about Katrina’s “ability and willingness to protect her children,” CPS took custody of Hailee in June 2009 and placed her with her maternal grandparents, and ADES filed a dependency petition alleging Katrina appeared unable to protect Hailee from potential abuse by Bryan. The juvenile court found Hailee dependent as to Katrina in August 2009 and, in May 2011, ordered ADES to file a motion to terminate Katrina’s parental rights.

¶5 In its findings of fact and conclusions of law issued after a contested termination hearing, the juvenile court found by clear and convincing evidence that Katrina had failed to remedy the circumstances that caused Hailee to be placed in court-ordered, out-of-home care for fifteen months or more, despite the extensive reunification services she had been offered by ADES, and that there was a substantial likelihood she would not be capable of exercising proper and effective parental control in the near future. The court further found by a preponderance of evidence that termination of Katrina’s parental rights would be in Hailee’s best interests because it would permit her to “achieve permanency in a safe and stable home with parents who are committed to her and are concerned with her best interests and [who] will protect her.”

Discussion

¶6 On appeal, Katrina argues ADES “failed to make reasonable efforts toward family reunification, failed to show that rehabilitative services were not adequately completed, failed to show that further services would be futile, [and] failed to show [she] had not remedied the circumstances that led to removal of the child.” She also contends ADES “failed to proffer requisite proof that the best interest of the child is served by termination.”

¶7 To terminate parental rights, a juvenile court must find the existence of at least one of the statutory grounds for termination enumerated in § 8-533(B) and “shall also consider the best interests of the child.” *Id.* Although statutory grounds for termination must be proven by clear and convincing evidence, only a preponderance of the evidence is required to establish that severance will serve the child’s best interests. *See* A.R.S. § 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will affirm an order terminating parental rights unless we can say as a matter of law that no reasonable person could find the essential elements proven by the applicable evidentiary standard. *Denise R. v. Ariz. Dep’t of Econ. Sec.*, 221 Ariz. 92, ¶¶ 9-10, 210 P.3d 1263, 1265-66 (App. 2009). We view the evidence in the light most favorable to upholding the court’s order. *Id.* ¶ 10.

Reunification Efforts

¶8 When a motion to terminate parental rights is based on any time-in-care ground found in § 8-533(B)(8), ADES must establish that it made a diligent effort to

provide the family with appropriate reunification services. ADES fulfills this duty by providing the parent “with the time and opportunity to participate in programs designed to help her become an effective parent.” *In re Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). But ADES is not required to provide the parent with every conceivable service or to ensure that she participates in every service offered. *Id.*

¶9 Katrina does not dispute the juvenile court’s finding that Hailee has been in court-ordered, out-of-home care for a cumulative total of fifteen months or longer, or its finding that services offered to Katrina included “psychological evaluation, psychiatric evaluation, visitation, parent aide services, parenting classes, behavioral health services, individual counseling, group therapy, team-decision making meeting[s], consideration of relatives for placement, and case management.” But she maintains ADES “failed to make a concerted effort” to preserve her relationship with Hailee because it arranged for visitation to be supervised by Katrina’s own parents, with whom Hailee had been placed, even though, she maintains, ADES was aware of her “ongoing conflict” with them. According to Katrina, this arrangement “significantly undermined the effectiveness of the visitation and on-going bonding” between Katrina and Hailee.

¶10 In response, ADES notes Katrina initially had been permitted “unlimited supervised visitation” at her parents’ home, where Hailee had been placed, but cites evidence that those visits were terminated after several months because of conflicts between Katrina and her parents; Katrina’s requests to bring Bryan to the home, and

CPS's interest in gaining information about how Katrina was "actually parenting," as Katrina often had visited the home during Hailee's naptime. Moreover, beginning in July or August 2009, Katrina also was provided with regular, scheduled visitation with Hailee, supervised by a parent aide. Because Katrina was offered twice-weekly visitation, supervised by a parent aide, through the better part of the twenty-eight months that Katrina remained in out-of-home care during the pendency of these proceedings, reasonable evidence supported the juvenile court's finding that ADES "made a diligent effort to provide appropriate reunification services" with respect to visitation.

¶11 Katrina also contends ADES's efforts to reunite the family were insufficient because CPS "placed continued pressure upon [her] to acknowledge that [Bryan] had conducted himself inappropriately toward her elder daughters, despite her continued belief to the contrary" and absent any "substantiation of any such inappropriate touching . . . through his psychological/polygraphic testing, law enforcement investigation, or CPS investigation." Clearly, CPS had been concerned that Katrina was "unwilling to participate in a safety plan to protect" Hailee or her other children because she did "not believe [Bryan] to be a threat" to them. And, notwithstanding Katrina's assertions that allegations of Bryan's inappropriate behavior with her daughters never had been "substantiat[ed]," there was evidence that children would be at risk in his care.

¶12 Dr. Carlos Vega, the psychologist who evaluated Bryan in August 2009 and February 2011, diagnosed Bryan with a personality disorder with salient narcissistic features and stated he was unable "to rule out the presence of a paraphilia" in light of

Bryan's "boundary issues." In February 2011, Vega concluded, "There are so many red flags when it comes to Bryan that I believe a child would be at risk in his care." At Vega's recommendation, Bryan was referred for intensive psychotherapy, but that therapy was terminated after three sessions because, the psychotherapist found, "His personality structure is such that in attempting to develop a therapeutic rapport his defensive 'armor' only gets stronger." Upon reviewing the psychotherapist's report, Vega stated, "Bryan's personality disorder is untreatable and he will not be able to profit from treatment. . . . The data show that Bryan is unable to minimally adequately parent a child and will not be able to do so in the near future."

¶13 To the extent CPS had encouraged Katrina to recognize the threat Bryan posed to her children's safety, it was her own psychological difficulties that were preventing her from being an effective parent. Dr. L. Loreen Fox-Shipley, the psychologist who first evaluated Katrina in September 2009, diagnosed her with dysthymic disorder and a dependent personality. Fox-Shipley concluded Katrina would "not be able to protect her children" until she was able to "assume responsibility for herself and her children independently," adding, "Her dependence upon others will become a priority over and above the safety of the children."

¶14 Consistent with this diagnosis, CPS reported that Katrina had "entertained multiple explanations" about why her daughters would have lied about Bryan's behavior, without ever considering "that the children may be truthfully reporting." But her "continued belief" that Bryan would never harm her children, while it might have been

viewed as symptomatic of her dependency issues, was not the basis of the termination of her parental rights. Ample evidence supported a finding that the services provided to Katrina, including individual counseling and codependency group sessions, were responsive to her mental health needs, as identified by psychological evaluation, and were sufficient to meet ADES's obligation to provide such reunification services.

Failure to Remedy Circumstances Causing Out-of-Home Placement

¶15 Katrina next appears to argue the juvenile court erred in finding she had failed to remedy the circumstances causing Hailee's lengthy out-of-home placement. She asserts she had "successfully completed all services" CPS had offered, had "established a stable residence," had "obtained employment credentials," and "had terminated her relationship with [Bryan]."

¶16 We construe "the circumstances that cause the child to be in an out-of-home placement," § 8-533(B)(8)(c), to mean "those circumstances existing at the time of the severance that prevent a parent from being able to appropriately provide for his or her children." *Jordan C. v. Dep't of Econ. Sec.*, 223 Ariz. 86, n.14, 219 P.3d 296, 306 n.14 (App. 2009), quoting *Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, ¶ 22, 152 P.3d 1209, 1213 (App. 2007). Unlike § 8-533(B)(8)(a), which authorizes termination when a child has remained in care for nine months or more and a parent has "substantially neglected or willfully refused to remedy" those circumstances, and thus is focused on a parent's efforts alone, see *Marina P.*, 214 Ariz. 326, ¶ 20, 152 P.3d at 1212, the inquiry under § 8-533(B)(8)(c) is whether, ultimately, a parent has been unable to

remedy those circumstances, while her child has remained in out-of-home placement for fifteen months or more, and is likely to remain unable to parent effectively in the near future.

¶17 Here, ADES argues that, “[t]hroughout the dependency proceedings, ADES informed [Katrina] that she needed to remedy her inability to protect Hailee, remedy her inability to meet Hailee’s needs independently, obtain and maintain stable employment, and obtain and maintain safe and stable housing” but, “[a]fter twenty-five months, [she] had yet to remedy these circumstances.” We agree that reasonable evidence supported the juvenile court’s findings that Katrina had failed to remedy the circumstances that caused Hailee to remain in out-of-home care and was unlikely to be able to parent effectively in the near future.

¶18 Although Katrina reported that she had terminated her relationship with Bryan three weeks before the final termination hearing and had moved in with a friend, and arguably had become more employable through a certification program, she remained unemployed and dependent on others. And, despite the many months of counseling CPS had provided, which Katrina had attended inconsistently, Katrina showed little progress in addressing her psychological impediments to parenting.

¶19 In an updated psychological evaluation conducted in February 2011, psychologist Julio Angulo generally confirmed Fox-Shipley’s conclusions and diagnosed Katrina with dysthymic disorder with prominent passive-dependent and avoidant personality traits. Dawn Baumgartner, the counselor Katrina had seen from January until

July 2011, testified that Katrina had not seemed to understand the “concept” that she needed to protect her children and that she had not noted any progress toward Katrina’s treatment goals of “show[ing] her ability to protect her children,” “acknowledg[ing] concerns relating to the care of her children,” and “be[ing] able to take care of her needs without relying on others.”

¶20 Moreover, CPS case manager Muriel McCraney-Gonzalez opined there was little likelihood that Katrina could be an effective parent in the near future, noting that CPS already had “offered nearly every service that the Department offers to parents.” But, according to McCraney-Gonzalez, despite more than two years of receiving those services, Katrina had failed to benefit as a parent, and the circumstances that prevented Hailee from returning to her care at the time of termination were similar—“if not exactly the same”—as those existing when the case began.

Best Interests

¶21 Katrina suggests that in order to establish that termination of parental rights is in the child’s best interests, “ADES must show the *benefit* of severance for the child as well as the *detriment* should severance be denied.” This is an inaccurate statement of the law. To establish best interests, ADES is required to show a child “would derive an affirmative benefit from termination *or* incur a detriment by continuing in the relationship.” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d 943, 945 (App. 2004) (emphasis added); *see also In re Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 5-6, 804 P.2d 730, 734-35 (1990) (same). Here, evidence

established that Hailee is flourishing in an adoptive home with her maternal grandparents, who have been providing for all of her needs from before her first birthday. This evidence was more than sufficient to support the juvenile court's finding of best interests. *See Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 5, 982 P.2d 1290, 1291 (App. 1998) ("One factor the court may properly consider in favor of severance is the immediate availability of an adoptive placement. Another is whether an existing placement is meeting the needs of the child.") (citation omitted).

Disposition

¶22 The juvenile court's order terminating Katrina's parental rights to Hailee is affirmed.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge